

SSB 5449 - H COMM AMD

By Committee on Natural Resources, Ecology & Parks

ADOPTED 04/11/2005

1 Strike everything after the enacting clause and insert the  
2 following:

3 "NEW SECTION. **Sec. 1.** A new section is added to chapter 70.105D  
4 RCW to read as follows:

5 (1) It is in the public interest for the department to recover  
6 remedial action costs incurred in discharging its responsibility under  
7 this chapter, as these recovered funds can then be applied to the  
8 cleanup of other facilities. Thus, in addition to other cost-recovery  
9 mechanisms provided under this chapter, this section is intended to  
10 facilitate the recovery of state funds spent on remedial actions by  
11 providing the department with lien authority. This will also prevent  
12 a facility owner or mortgagee from gaining a financial windfall from  
13 increased land value resulting from department-conducted remedial  
14 actions at the expense of the state taxpayers.

15 (2) If the state of Washington incurs remedial action costs  
16 relating to a remedial action of real property, and those remedial  
17 action costs are unrecovered by the state of Washington, the department  
18 may file a lien against that real property.

19 (a) Except as provided in (c) of this subsection, liens filed under  
20 this section shall have priority in rank over all other privileges,  
21 liens, monetary encumbrances, or other security interests affecting the  
22 real property, whenever incurred, filed, or recorded, except for the  
23 following liens:

24 (i) Local and special district property tax assessments; and

25 (ii) Mortgage liens recorded before liens or notices of intent to  
26 conduct remedial actions are recorded under this section.

27 (b) Liens filed pursuant to (a) and (c) of this subsection shall  
28 not exceed the remedial action costs incurred by the state.

29 (c)(i) If the real property for which the department has incurred  
30 remedial action costs is abandoned, the department may choose to limit

1 the amount of the lien to the increase in the fair market value of the  
2 real property that is attributable to a remedial action conducted by  
3 the department. The increase in fair market value shall be determined  
4 by subtracting the county assessor's value of the real property for the  
5 most recent year prior to remedial action being initiated from the  
6 value of the real property after remedial action. The value of the  
7 real property after remedial action shall be determined by the bona  
8 fide purchase price of the real property or by a real estate appraiser  
9 retained by the department. Liens limited in this way have priority in  
10 rank over all other privileges, liens, monetary encumbrances, or other  
11 security interests affecting the real property, whenever incurred,  
12 filed, or recorded.

13 (ii) For the purposes of this subsection, "abandoned" means there  
14 has not been significant business activity on the real property for  
15 three years or property taxes owed on the real property are three years  
16 in arrears prior to the department incurring costs attributable to this  
17 lien.

18 (d) The department shall, when notifying potentially liable persons  
19 of their potential liability under RCW 70.105D.040, include a notice  
20 stating that if the department incurs remedial action costs relating to  
21 the remediation of real property and the costs are not recovered by the  
22 department, the department may file a lien against that real property  
23 under this section.

24 (e) Except for emergency remedial actions, the department must  
25 provide notice to the following persons before initiating remedial  
26 actions conducted by persons under contract to the department on real  
27 property on which a lien may be filed under this section:

28 (i) The real property owner;

29 (ii) Mortgagees;

30 (iii) Lienholders of record;

31 (iv) Persons known to the department to be conducting remedial  
32 actions at the facility at the time of such notice; and

33 (v) Persons known to the department to be under contract to conduct  
34 remedial actions at the facility at the time of such notice.

35 For emergency remedial actions, this notice shall be provided  
36 within thirty days after initiation of the emergency remedial actions.

37 (f) The department may record a copy of the notice in (e) of this  
38 subsection, along with a legal description of the property on which the

1 remedial action will take place, with the county auditor in the county  
2 where the real property is located. If the department subsequently  
3 files a lien, the effective date of the lien will be the date this  
4 notice was recorded.

5 (3) Before filing a lien under this section, the department shall  
6 give the owner of real property on which the lien is to be filed and  
7 mortgagees and lienholders of record a notice of its intent to file a  
8 lien:

9 (a) The notice required under this subsection (3) must be sent by  
10 certified mail to the real property owner and mortgagees of record at  
11 the addresses listed in the recorded documents. If the real property  
12 owner is unknown or if a mailed notice is returned as undeliverable,  
13 the department shall provide notice by posting a legal notice in the  
14 newspaper of largest circulation in the county the site is located.  
15 The notice shall provide:

16 (i) A statement of the purpose of the lien;

17 (ii) A brief description of the real property to be affected by the  
18 lien;

19 (iii) A statement of the remedial action costs incurred by the  
20 state related to the real property affected by the lien;

21 (iv) A brief statement of facts showing probable cause that the  
22 real property is the subject of the remedial action costs incurred by  
23 the department; and

24 (v) The time period following service or other notice during which  
25 any recipient of the notice whose legal rights may be affected by the  
26 lien may comment on the notice.

27 (b) Any comments on the notice must be received by the department  
28 on or before thirty days following service or other provision of the  
29 notice of intent to file a lien.

30 (c) If no comments are received by the department, the lien may be  
31 filed on the real property immediately.

32 (d) If the department receives any comments on the lien, the  
33 department shall determine if there is probable cause for filing the  
34 certificate of lien. If the department determines there is probable  
35 cause, the department may file the lien. Any further challenge to the  
36 lien may only occur at the times specified under RCW 70.105D.060.

37 (e) If the department has reason to believe that exigent  
38 circumstances require the filing of a lien prior to giving notice under

1 this subsection (3), or prior to the expiration of the time period for  
2 comments, the department may file the lien immediately. For the  
3 purposes of this subsection (3), exigent circumstances include, but are  
4 not limited to, an imminent bankruptcy filing by the real property  
5 owner, or the imminent transfer or sale of the real property subject to  
6 lien by the real property owner, or both.

7 (4) A lien filed under this section is effective when a statement  
8 of lien is filed with the county auditor in the county where the real  
9 property is located. The statement of lien must include a description  
10 of the real property subject to lien and the amount of the lien.

11 (5) Unless the department determines it is in the public interest  
12 to remove the lien, the lien continues until the liability for the  
13 remedial action costs have been satisfied through sale of the real  
14 property, foreclosure, or other means agreed to by the department. Any  
15 action for foreclosure of the lien shall be brought by the attorney  
16 general in a civil action in the court having jurisdiction and in the  
17 manner prescribed for the judicial foreclosure of a mortgage.

18 (6)(a) This section does not apply to real property owned by a  
19 local government or special purpose district or real property used  
20 solely for residential purposes and consisting of four residential  
21 units or less at the time the lien is recorded. This limitation does  
22 not apply to illegal drug manufacturing and storage sites under chapter  
23 64.44 RCW.

24 (b) If the real property owner has consented to the department  
25 filing a lien on the real property, then only subsection (3)(a)(i)  
26 through (iii) of this section requiring notice to mortgagees and  
27 lienholders of record apply.

28 **Sec. 2.** RCW 70.105D.050 and 2002 c 288 s 4 are each amended to  
29 read as follows:

30 (1) With respect to any release, or threatened release, for which  
31 the department does not conduct or contract for conducting remedial  
32 action and for which the department believes remedial action is in the  
33 public interest, the director shall issue orders or agreed orders  
34 requiring potentially liable persons to provide the remedial action.  
35 Any liable person who refuses, without sufficient cause, to comply with  
36 an order or agreed order of the director is liable in an action brought  
37 by the attorney general for:

1 (a) Up to three times the amount of any costs incurred by the state  
2 as a result of the party's refusal to comply; and

3 (b) A civil penalty of up to twenty-five thousand dollars for each  
4 day the party refuses to comply.

5 The treble damages and civil penalty under this subsection apply to all  
6 recovery actions filed on or after March 1, 1989.

7 (2) Any person who incurs costs complying with an order issued  
8 under subsection (1) of this section may petition the department for  
9 reimbursement of those costs. If the department refuses to grant  
10 reimbursement, the person may within thirty days thereafter file suit  
11 and recover costs by proving that he or she was not a liable person  
12 under RCW 70.105D.040 and that the costs incurred were reasonable.

13 (3) The attorney general shall seek, by filing an action if  
14 necessary, to recover the amounts spent by the department for  
15 investigative and remedial actions and orders, and agreed orders,  
16 including amounts spent prior to March 1, 1989.

17 (4) The attorney general may bring an action to secure such relief  
18 as is necessary to protect human health and the environment under this  
19 chapter.

20 (5)(a) Any person may commence a civil action to compel the  
21 department to perform any nondiscretionary duty under this chapter. At  
22 least thirty days before commencing the action, the person must give  
23 notice of intent to sue, unless a substantial endangerment exists. The  
24 court may award attorneys' fees and other costs to the prevailing party  
25 in the action.

26 (b) Civil actions under this section and RCW 70.105D.060 may be  
27 brought in the superior court of Thurston county or of the county in  
28 which the release or threatened release exists.

29 (6) Any person who fails to provide notification of releases  
30 consistent with RCW 70.105D.110 or who submits false information is  
31 liable in an action brought by the attorney general for a civil penalty  
32 of up to five thousand dollars per day for each day the party refuses  
33 to comply.

34 (7) Any person who owns real property or lender holding a mortgage  
35 on real property that is subject to a lien filed under section 1 of  
36 this act may petition the department to have the lien removed or the  
37 amount of the lien reduced. If, after consideration of the petition  
38 and the information supporting the petition, the department decides to

1 deny the request, the person may, within ninety days after receipt of  
2 the department's denial, file suit for removal or reduction of the  
3 lien. The person is entitled to removal of a lien filed under section  
4 1(2)(a) of this act if they can prove by a preponderance of the  
5 evidence that the person is not a liable party under RCW 70.105D.040.  
6 The person is entitled to a reduction of the amount of the lien if they  
7 can prove by a preponderance of the evidence:

8 (a) For liens filed under section 1(2)(a) of this act, the amount  
9 of the lien exceeds the remedial action costs the department incurred  
10 related to cleanup of the real property; and

11 (b) For liens filed under section 1(2)(c) of this act, the amount  
12 of the lien exceeds the remedial action costs the department incurred  
13 related to cleanup of the real property or exceeds the increase of the  
14 fair market value of the real property solely attributable to the  
15 remedial action conducted by the department.

16 **Sec. 3.** RCW 70.105D.060 and 1994 c 257 s 13 are each amended to  
17 read as follows:

18 The department's investigative and remedial decisions under RCW  
19 70.105D.030 and 70.105D.050, its decisions regarding filing a lien  
20 under section 1 of this act, and its decisions regarding liable persons  
21 under RCW 70.105D.020(~~((+8) and))~~ (16), 70.105D.040, 70.105D.050, and  
22 section 1 of this act shall be reviewable exclusively in superior court  
23 and only at the following times: (1) In a cost recovery suit under RCW  
24 70.105D.050(3); (2) in a suit by the department to enforce an order or  
25 an agreed order, or seek a civil penalty under this chapter; (3) in a  
26 suit for reimbursement under RCW 70.105D.050(2); (4) in a suit by the  
27 department to compel investigative or remedial action; (~~and~~) (5) in  
28 a citizen's suit under RCW 70.105D.050(5); and (6) in a suit for  
29 removal or reduction of a lien under RCW 70.105D.050(7). Except in  
30 suits for reduction or removal of a lien under RCW 70.105D.050(7), the  
31 court shall uphold the department's actions unless they were arbitrary  
32 and capricious. In suits for reduction or removal of a lien under RCW  
33 70.105D.050(7), the court shall review such suits pursuant to the  
34 standards set forth in RCW 70.105D.050(7)."

35 Correct the title.

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